Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–113 OF 2008
LOW HOP BING, SULONG MATJERAIE AND RAMLY ALI JJCA
5 MAY 2009

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Companies and Corporations — Winding up — Stay of order — First winding-up order against respondent stayed — Whether second winding up order against respondent in different court valid — Whether stay order terminates or discontinues first winding up order — Whether one High Court could set aside winding up order made by another High Court — Whether leave required to file second and subsequent winding up petitions against company not yet wound up

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The appellant filed a winding up petition against the respondent in the Ipoh High Court on 5 January 2007 for failure to settle a debt of RM479,825.52. Although the petition was served on the respondent, it failed to attend court at the hearing thereof on 21 June 2007, resulting in a winding up order being made against it on that date ('the Ipoh winding up order'). As the respondent's registered address was in Kuala Lumpur, the court, after making the winding up order, allowed the official receiver's application to transfer the matter to the Kuala Lumpur High Court ('KL–D8 court'). On 20 July 2007, the respondent filed a notice of motion in the KL–D8 court to stay the Ipoh winding up order pending its appeal to the Court of Appeal against the making of the order. When the motion came up for hearing on 24 October 2007, the court was informed that in 2005 a winding up petition had been presented against the respondent in another Kuala Lumpur High Court ('KL–D2 court'). Thereupon, the KL–D8 court dismissed the respondent's motion for stay and, on its own volition, set aside the Ipoh winding up order on the ground that since a winding up petition against the respondent in KL–D2 court already existed since 2005, the winding up proceeding in the Ipoh High Court could not have been filed, and that, in any event, no leave had been obtained to file the petition in the Ipoh High Court under s 226(3) of the Companies Act 1965 ('the Act'). Meanwhile, in the proceedings in the KL–D2 court, a winding up order was made against the respondent on 2 February 2007 but it was stayed by mutual consent by an order dated 15 June 2007 because the debt in question had been settled. These facts were not known either to the Ipoh High Court or to the KL–D8 court when they made their respective decisions on 21 June 2007 and 24 October 2007. Upon knowing of the stay order, the appellant filed a summons in chambers ('SIC') in the KL–D8 court for further directions on the argument that the stay order effectively discontinued or terminated the winding up proceedings in the KL–D2 court. However, at the hearing of the SIC on 17 January 2008, the court disagreed with that argument, dismissed the

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SIC and on its own volition set aside the Ipoh winding up order. The appellant appealed against that decision to the Court of Appeal. The issues for determination before the Court of Appeal were whether (i) the KL–D8 court had the jurisdiction to set aside the Ipoh winding up order (ii) the filing of the winding up petition in the Ipoh High Court was valid when there already was a similar petition filed earlier in the KL–D2 court on which no order had yet been made and (iii) the Ipoh winding up order was validly made when there was an earlier winding up order against the respondent in the KL–D2 court but which order had been stayed.

Held, allowing the appeal with costs:

(1) The KL–D8 court had no jurisdiction to set aside or rescind a winding up order earlier made and perfected by the Ipoh High Court on 21 June 2007. The KL–D8 court had already been functus officio and the matter was res judicata. Even if the Ipoh High Court's decision to grant the winding up order was wrong, it should have been dealt with by the Court of Appeal on appeal by the respondent and not be set aside or rescinded by another High Court of concurrent jurisdiction (see para 17).

(2) The Companies Act 1965 or the Companies (Winding-Up) Rules 1972 made no express provision enabling the High Court to set aside or rescind a winding up order after it had been made and perfected (see para 19).

(3) In law, there was nothing against the filing of more than one winding up petition against the same company at any one time. No leave was required for the filing of the second and subsequent winding up petitions if the company has not been wound up. However, at no time could a company which has been wound up be subsequently wound up again (see para 25).

(4) The winding up petition filed in the Ipoh High Court on 5 January 2007 was valid even though at the time of filing there was another winding up petition earlier filed and pending in the KL–D2 court. No leave was required for such filing under s 226(3) (see para 29).

(5) The legal effect of the stay order on the winding up order made in the KL–D2 court was to totally terminate the winding up order against the respondent. Consequently, the Ipoh winding up order on 21 June 2007 was correctly granted and valid in law (see para 37).

[Bahasa Malaysia summary

Perayu telah memfailkan petisyen penggulungan terhadap responden di Mahkamah Tinggi Ipoh pada 5 Januari 2007 untuk kegagalan menyelesaikan hutang sebanyak RM479,825.52. Meskipun petisyen tersebut telah disampaikan terhadap responden, ia gagal untuk hadir di mahkamah untuk perbicaraan tersebut pada 21 Jun 2007, yang mana menyebabkan perintah

penggulungan dibuat terhadapnya pada tarikh tersebut ('perintah penggulungan Ipoh'). Memandangkan alamat berdaftar responden adalah di Kuala Lumpur, mahkamah, setelah membuat perintah penggulungan, telah membenarkan permohonan pegawai penerima untuk memindahkan perkara tersebut ke Mahkamah Tinggi Kuala Lumpur ('mahkamah KL–D8'). Pada 20 Julai 2007, responden telah memfailkan notis usul di mahkamah KL–D8 untuk menangguhkan perintah penggulungan Ipoh sementara menunggu rayuannya ke Mahkamah Rayuan terhadap perintah yang dibuat. Apabila usul tersebut disambung untuk perbicaraan pada 24 Oktober 2007, mahkamah telah diberitahu bahawa pada 2005 petisyen penggulungan telah dikemukakan terhadap responden di Mahkamah Tinggi Kuala Lumpur yang lain ('mahkamah KL–D2'). Lanjutan itu, mahkamah KL–D8 telah menolak usul responden untuk penangguhan dan, atas kerelaannya sendiri, telah mengetepikan perintah penggulungan Ipoh atas alasan bahawa memandangkan petisyen penggulungan terhadap responden di mahkamah KL–D2 telah wujud sejak 2005, prosiding penggulungan di Mahkamah Tinggi Ipoh tidak boleh difailkan, dan bahawa, dalam keadaan-keadaan ini, tiada kebenaran telah diperoleh untuk memfailkan petisyen di Mahkamah Tinggi Ipoh di bawah s 226(3) Akta Syarikat 1965 ('Akta tersebut'). Sementara itu, dalam prosiding di mahkamah KL–D2, perintah penggulungan telah dibuat terhadap responden pada 2 Februari 2007 tetapi ia telah ditangguhkan dengan persetujuan bersama melalui perintah bertarikh 15 Jun 2007 oleh kerana hutang berkaitan telah diselesaikan. Fakta-fakta ini tidak diketahui di Mahkamah Tinggi Ipoh atau di mahkamah KL–D8 apabila ia membuat keputusan masing-masing pada 21 Jun 2007 dan 24 Oktober 2007. Setelah mendapat tahu tentang perintah penangguhan tersebut, perayu telah memfailkan saman dalam kamar ('SDK') di mahkamah KL–D8 untuk arahan selanjutnya tentang bantahan bahawa perintah penangguhan telah secara efektif memberhentikan atau membatalkan prosiding penggulungan di mahkamah KL–D2. Walau bagaimanapun, pada perbicaraan SDK pada 17 Januari 2008, mahkamah tidak bersetuju dengan bantahan tersebut, telah menolak SDK dan atas kerelaannya sendiri telah mengetepikan perintah penggulungan Ipoh tersebut. Perayu telah membuat rayuan terhadap keputusan tersebut ke Mahkamah Rayuan. Isu-isu untuk penentuan di hadapan Mahkamah Rayuan adalah sama ada (1) mahkamah KL–D8 mempunyai bidang kuasa untuk mengetepikan perintah penggulungan Ipoh; (ii) pemfailan petisyen penggulungan di Mahkamah Tinggi Ipoh adalah sah apabila sudah terdapat petisyen serupa yang telah difailkan terdahulu di mahkamah KL-D2 yang mana tiada perintah telah diberikan dan (iii) perintah penggulungan Ipoh telah dibuat dengan sah apabila terdapat perintah penggulungan yang terdahulu terhadap responden di mahkamah KL–D2 yang mana perintah tersebut telah ditangguhkan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mahkamah KL–D8 tidak mempunyai bidang kuasa untuk mengetepi

atau membatalkan perintah penggulungan yang dibuat dan disempurnakan terlebih dahulu oleh Mahkamah Tinggi Ipoh pada 21 Jun 2007. Mahkamah KL–D8 telah functus officio dan perkara tersebut adalah res judicata. Meskipun keputusan Mahkamah Tinggi Ipoh untuk memberikan perintah penggulungan adalah salah, ia seharusnya dibicarakan oleh Mahkamah Rayuan semasa rayuan oleh responden dan tidak seharusnya diketepikan atau dibatalkan oleh Mahkamah Tinggi yang lain yang mempunyai bidang kuasa serentak (lihat perenggan 17).

(2) Akta Syarikat 1965 atau Kaedah-Kaedah (Penggulungan) Syarikat 1972 tidak membuat sebarang peruntukan nyata yang membolehkan Mahkamah Tinggi untuk mengetepi atau membatalkan perintah penggulungan selepas ianya telah dibuat atau disempurnakan (lihat perenggan 19).

(3) Dalam undang-undang, tidak terdapat halangan dalam memfailkan lebih daripada satu petisyen penggulungan terhadap syarikat yang sama pada segenap masa. Tiada kebenaran yang diperlukan untuk memfailkan petisyen penggulungan yang kedua dan seterusnya sekiranya syarikat tidak lagi digulungkan. Walau bagaimanapun, bukan pada bila-bila masa suatu syarikat yang telah digulungkan kemudiannya digulungkan semula (lihat perenggan 25).

(4) Petisyen penggulungan yang difailkan di Mahkamah Tinggi Ipoh pada 5 Januari 2007 adalah sah meskipun pada masa pemfailan terdapat petisyen penggulungan yang terdahulu yang telah difailkan dan tertangguh di mahkamah KL–D2. Tiada kebenaran yang diperlukan untuk pemfailan tersebut di bawah s 226(3) Akta (lihat perenggan 29).

(5) Kesan undang-undang perintah penangguhan ke atas perintah penggulungan yang dibuat di mahkamah KL–D2 adalah untuk membatalkan perintah penggulungan terhadap responden sepenuhnya. Berikutan itu, perintah penggulungan Ipoh pada 21 Jun 2007 telah diberikan dengan betul dan sah di sisi undang-undang (lihat perenggan 37).]

Notes

For cases on stay of order, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1545–1556.

Cases referred to

Cosmopolitan Life Association, Re (1893) 15 PR 185 (refd)
European Banking Company: Ex parte Baylis, In re (1866) LR 2 Eq 521 (refd)
Krextile Holdings Pty Ltd v Widdows [1974] VR 689 (refd)
Ladli Prasad Jaiswal v Karnal Distillery Co Ld (1954) Comp Cas 77 (refd)
London Marine Insurance Association, Re (1896) LR Eq 176 (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd (and 4 Other Appeals) [2001] 4 MLJ 187; [2001] 3 AMR 2893, CA (refd)
Michael P Georges Co Ltd, Re [1948] OR 78 (refd)
Mid East Trading Ltd, Re [1998] 1 All ER 577 (refd)
Overend, Gurney and Co Ltd, ex parte Oakes and Peek (No 2), Re (1876) 36 LJ Ch 413 (refd)
Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd [1996] 4 MLJ 343, HC (refd)
Reliance Properties Ltd, Re [1951] 2 All ER 327 (refd)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325, SC (refd)
Vijayalakshimi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830, CA (refd)

Legislation referred to

Companies Act 1965 ss 243(1), 218 (1)(e), 226(3)
Companies (Winding-Up) Rules 1972 r 32(1)(d)

Leong Kok Keong (Mohd Khairil Abidin with him) (Kean Chye & Sivalingam) for the appellant.
Shamsul Zakri Zakaria (Legal Officer, Department of Insolvency Malaysia) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned judge of the Kuala Lumpur High Court (KL–D8) dated 17 January 2008 in setting aside the winding up order earlier made by the Ipoh High Court on 21 June 2007 vide the Ipoh High Court Companies (Winding-Up) Petition No 28–1 of 2007 ('Ipoh winding up') against the respondent.

FACTUAL BACKGROUND

[2] The appellant is a subcontractor for the respondent who was the main contractor for the flood mitigation works carried out for the benefit of the Department of Irrigation and Drainage Malaysia, at Kampung Gajah, Teluk Intan, Perak Darul Ridzuan.

[3] It is not in dispute that the respondent owed the appellant a sum of RM479,825.52. The appellant then issued a statutory notice pursuant to s 218(1)(e) of the Companies Act 1965 and served it on the respondent on 5 October 2006. The respondent did not pay the debt even after expiry of the 21 days.

[4] On 5 January 2007, the appellant filed a Winding Up Petition No 28–1 of 2007 at the Ipoh High Court and the petition was fixed for hearing on 21 June 2007. The said petition was duly served on the respondent on 23 February 2007. The Ipoh High Court then issued a registrars' certificate of due compliance pursuant to r 32(1)(d) of the Companies (Winding-Up) Rules 1972 on 30 May 2007.

[5] On the date of hearing of the petition on 21 June 2007 the respondent failed to turn up even though the petition was duly served on it. The Ipoh High Court then proceeded to hear the submissions on merits by the appellant's counsel and after the official receiver from the Insolvency Department, Ipoh Office confirmed that the papers are in order, the learned judge then ordered that the respondent be wound up.

[6] The Ipoh High Court was also informed on the hearing date that an official search with the registrar of companies does not disclose existence of any winding up order on the respondent company and there is also no other winding up notice in the Ipoh official receiver's records on the date of hearing.

[7] After the winding up order was granted by the Ipoh High Court, the official receiver then requested that the matter be transferred to the jurisdiction of Kuala Lumpur High Court as the respondent has it's registered address in Kuala Lumpur. This case was subsequently transferred to the Kuala Lumpur High Court (Commercial Division) and registered as the Companies (Winding-Up) Petition No D8–28–570 of 2007 (KL–D8).

[8] On 5 July 2007, the respondent filed a notice of appeal to the Court of Appeal vide Court of Appeal Civil Appeal No A-02–674 of 2007 through Messrs Shamsuddin & Co against the winding up order made by the Ipoh High Court.

THE PROCEEDINGS IN THE KUALA LUMPUR HIGH COURT

[9] In the Kuala Lumpur High Court, the respondent filed a notice of motion dated 20 July 2007 (encl 18) for a stay order against the Ipoh winding up order dated 21 June 2007. On 24 October 2007, the date of hearing of the respondent's notice of motion for a stay order, a different officer from the Insolvency Department, Kuala Lumpur office, informed the court that there was an earlier winding up petition vide Kuala Lumpur High Court Companies (Winding-Up) Petition No D2–28–372 of 2005 (D2 petition).

[10] After hearing oral submissions, on the same day on 24 October 2007, the learned judge of the Kuala Lumpur High Court (KL–D8) dismissed the respondent's motion for stay. Instead the learned judge on his own volition

concluded that once there is in existence a winding up petition in D2 Court, it is impossible to have another winding up proceedings against the same company in the Ipoh High Court. Therefore the learned judge concluded that leave is required to file the Ipoh winding up petition under s 226(3) of the Companies Act 1965. Since no leave was given in the Ipoh High Court for the petition therein the learned judge then set aside the Ipoh High Court winding up order.

[11] On the same day (24 October 2007) the learned judge also directed the official receiver to file a written report within one (1) month from 24 October 2007 to confirm whether there was an earlier winding up order granted on 2 February 2007 by the D2 court against the respondent.

[12] Since the official receiver failed to observe the directions given by the learned judge on 24 October 2007, the appellant then filed a summons in chambers dated 10 December 2007 (encl 39) for further direction and order from the High Court as the appellant discovered that there was actually a stay order of the D2 winding up order granted by the D2 court on 15 June 2007 which was never disclosed to the learned judge on 24 October 2007.

[13] During hearing of the appellant's said summons in chambers dated (encl 39) on 17 January 2008 before the Kuala Lumpur High Court (KL–D8), the appellant's solicitors submitted that the effect of an order for stay of the D2 winding up order is a total discontinuance or termination of the winding up proceedings. The learned judge however disagreed and dismissed encl 39 with costs and at the same time on his own volition set aside the Ipoh winding up order. Hence the present appeal to this court.

[14] In a nutshell, the court summarises that following chronology of events:

(a) Petition in the Companies (Winding-Up) Petition No D2–28–372 of 2005 was filed on 26 May 2005 in Kuala Lumpur High Court (KL–D2), however this petition was not indicated in the Registrar of Companies search dated 11 July 2005;

(b) the said petition was allowed by the KL–D2 court on 2 February2007 but stayed due to mutual consent pursuant to s 243(1) of the Companies Act 1965 by order dated 15 June 2007, because the debt in question was settled;

(c) in the meantime another petition was filed on 5 January 2007 at the Ipoh High Court and as at that material time there was no indication of any winding up order made against the respondent based on the earlier D2 petition;

(d) the petition was allowed by the Ipoh High Court on 21 June 2007 after a stay order of the winding up was granted on 1 June 2007 by the KL–D2 High Court because the debt in the D2 petition was settled; and

(e) after the Ipoh winding up order was made the file of the case was transferred to Kuala Lumpur High Court (KL–D8) on request made by the official receiver as the respondent's registered office was in Kuala Lumpur.

ISSUES TO BE DETERMINED

[15] The issues to be determined by this court are as follows:

(a) on jurisdictional issue, whether the learned judge of the KL–D8 court has the jurisdiction to set aside the winding up order earlier made and perfected by the Ipoh High Court; and

(b) on merit, whether the learned judge of the KL–D8 Court was right when he set aside the winding up order earlier made by the Ipoh High Court.

[16] In determining the second issue above, the following subsidiary issues need to be dealt with:

(a) whether the Ipoh winding up petition can validly be filed at the date when the D2 winding up petition in the KL–D2 High Court had earlier been filed but no winding up order been made yet;

(b) whether the Ipoh winding up order can be granted by the Ipoh High Court after the D2 winding up order in the KL–D2 High Court had been stayed.

[17] On the jurisdictional issue, this court is of the view that the learned judge of the KL–D8 court clearly has no jurisdiction to set aside or rescind a winding up order earlier made and perfected by another High Court, in this case the Ipoh High Court on 21 June 2007. The KL–D8 Court had already been functus officio and the matter is res judicata. Even if the decision of the Ipoh High Court in granting the winding up order is wrong, it should have been dealt with by the Court of Appeal (on appeal by the respondent), but not to be set aside or rescinded by another High Court of concurrent jurisdiction.

[18] The above principle was stressed by the Court of Appeal in *Vijayalakshimi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830.

[19] The Companies Act 1965 or the Companies (Winding-Up) Rules 1972 make no express provision enabling the High Court to set aside or rescind a

winding up order after it had been made and perfected. The scheme of the Act is such that an aggrieved party may under s 253 of the Act appeal against a winding up order, or apply to stay to proceedings under s 243 of the Act altogether or for a limited time, under terms and conditions which the court thinks fit (see *Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd* [1996] 4 MLJ 343; and *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325).

[20] In this respect, the court is in agreement with the learned author Derek French in his book *Applications To Wind Up Companies* — (2nd Ed) at p 289 para 4.4.3 when he says:

> A winding-up order is a final order. In subsequent proceedings in the winding-up, the Court will not consider whether the order was properly made; that can be considered only on an appeal against the order.

The same principle was adopted and applied in *Re Michael P Georges Co Ltd* [1948] OR 78; *Re Reliance Properties Ltd* [1951] 2 All ER 327; *Re Overend, Gurney and Co Ltd, ex parte Oakes and Peek (No 2)* (1876) 36 LJ Ch 413; *Re London Marine Insurance Association* (1896) LR Eq 176, *Re Cosmopolitan Life Association* (1893) 15 PR 185; and *Re Mid East Trading Ltd* [1998] 1 All ER 577.

[21] On this issue alone, the appeal should be allowed and the order of the learned judge of the KL–D8 court dated 7 January 2008 be set aside.

[22] The next issue is whether the Ipoh winding up petition can validly be filed at the date when the D2 winding up petition in the KL–D2 High Court had earlier been filed but no winding up order been made yet.

[23] In the present case, the D2 winding up petition was filed on 26 May 2005 and the winding up order was made by the KL–D2 High Court on 2 February 2007; while the Ipoh winding up petition was filed in court on 5 January 2007. In other words, when the Ipoh winding up petition was filed in court, there is no winding up order in existence against the respondent in any court. The KL–D2 winding up order was only made about one month after the Ipoh winding up petition was filed.

[24] The learned judge of the KL–D8 was of the view that there cannot be more than one winding up petition to be filed against the respondent at any one time and held that the Ipoh High Court petition was wrongly filed.

[25] With respect, this court cannot agree with the learned judge on this point. It is a settled legal principle that in law there is nothing against the filing of more then one winding up petition against the same company at any one

time. There is no leave required for the filing of the second and subsequent winding up petitions if the company has not been wound up yet. However, the court must stress that at no time a company which has been wound up can subsequently be wound up again.

[26] This matter concerning the position of several petitions for the winding up of the same company was considered in *In re European Banking Company: Ex parte Baylis* (1866) LR 2 Eq 521 where Sir RT Kindersley VC, observed:

> However desirable it is to avoid a number of petitions being presented for the winding up of a company, I am not aware of any rule having been established with a view to limit the number of them. But still every one of these petitions ought to be looked at separately upon its own merits as if it were the only petition presented.

[27] The above proposition was adopted and followed by Dulat J in *Ladli Prasad Jaiswal v Karnal Distillery Co Ld* (1954) Comp Cas 77, where he held:

> It is not shown that this view has been departed from in the English Courts. There is thus no authority for concluding that the appellant's petition for the winding-up of this company is not maintainable because a previous petition by him of a similar kind is pending and has not yet been decided.

[28] The above principle was accepted and followed by the Court of Appeal in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187; [2001] 3 AMR 2893, where it was held by Gopal Sri Ram JCA, inter alia, that:

> I require no clearer authority for the proposition that more than one winding up petition may be presented against a company. Of course, the provision of r 33 is available to a petitioning creditor. And if he does not take advantage of the rule to have him substituted for a lethargic petitioner, he may find himself out of pocket for his costs. But on no account is his petition bad in law. Nor is it an abuse of the court's process.

[29] The above authorities clearly support the findings of this court that the Ipoh High Court winding up petition filed on 5 January 2007 is valid in law, even though at the time of filing there was another winding up petition earlier filed and pending in the KL–D2 High Court. No leave is required for such filing under s 226(3) of the Companies Act 1963.

[30] The court will now deal with the last issue ie whether the Ipoh winding up order can be granted by the Ipoh High Court on 21 June 2007 after the D2 winding up order in the KL–D2 High Court had been stayed on 15 June 2007 under s 243(1) of the Companies Act 1965. In other words: what is the legal effect of a stay order on a winding-up order?

[31] In this case, the D2 winding up order was made by the KL–D2 High Court on 2 February 2007 and later on 15 June 2007 was stayed by the same court due to mutual consent of the parties pursuant to s 243(1) of the Companies Act 1965 because the debt in question was fully settled. The Ipoh winding up petition was filed on 5 January 2007 and a winding up order was granted on 21 June 2007 (six days after the D2 winding up order in the KL–D2 Court was stayed).

[32] Learned counsel for the appellant submitted that the stay order granted by the KL–D2 court on 15 June 2007 had the effect of total discontinuance or termination of the D2 winding up proceedings, as if there was no winding up order against the respondent at all, and therefore on 21 June 2007 the learned judge in the Ipoh High Court was at liberty and correct in granting a winding up order against the respondent.

[33] In the present case, the KL–D2 winding up order was stayed wholly by consent, the debt was fully settled the KL–D2 petition has now outlived its purpose. It has the effect of being totally discontinued or terminated. In law, the effect of such a stay order was clearly narrated by NH Chan JCA in the case of *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830 (at p 833) as follows:

> The effect of an order to stay proceedings under the winding up order altogether after a winding up order has been made is a total discontinuance or termination of the winding up proceedings. In *2 Jowitt's Dictionary of English Law* (2nd Ed) under 'Stay' at pp 1701–1702, after stating that the term 'stay of proceedings' can mean a total discontinuance of an action, it says this: '… but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action cannot be dismissed, because the Court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment … the stay operation of an order means that the order which has been stayed would not be operative from the date of the passing of the stay order.

[34] The same principle was laid down in the case of *Krextile Holdings Pty Ltd v Widdows* (1974) VR 689, in that the order of a stay of the winding up, if expressed in unlimited terms (as in the present case), would put an end to the winding up process and the respondent company can thereupon resume the conduct of its business and affairs as if no winding up existed at all. If proceedings in the winding up are stayed by order of the court, any duty of the official receiver to send report ceases (see *Halsbury's Laws of England* (4th Ed Reissue) para 1528).

[35] Now, the question is: can the Ipoh High Court make a winding up order against the respondent after the KL–D2 winding up order was stayed wholly?

[36] The above authorities are clear indicators that the answer to the above question is in the affirmative. The Court of Appeal's decisions in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram* and *Maril-Rionebel (M) Sdn Bhd* are very clear on this issue and are binding on the High Court. The learned High Court judge (KL–D8) should have followed those decisions.

CONCLUSION

[37] The above consideration leads the court to only one conclusion ie the decision of the Kuala Lumpur High Court (KL–D8) on 17 January 2008 ought to be reversed because the learned judge has failed to appreciate the legal effect of the stay order in the D2 petition granted by the KL–D2 Court, which totally terminated the winding up order against the respondent. Consequently the Ipoh High Court Winding Up Order on 21 June 2007 was correctly granted and valid in law.

[38] In the circumstances, this court unanimously allowed the appeal with costs of RM1000 to the appellant and deposit to be refunded to the appellant. The decision of the learned judge of the Kuala Lumpur High Court (KL–D8) is set aside and the decision of the learned judge of the Ipoh High Court is restored, so that the record will show that the record will show that the respondent is wound up as of 21 June 2007.

Appeal allowed with costs.

Reported by Ashok Kumar